BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

SANTA BARBARA INN
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-99
Case No. T-70-10
and
Case No. T-70-11

Employer Account No.

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

The Department has appealed from Referee's Decision Nos. LA-T-3286 and LA-T-3287 which granted petitions for reassessment on two assessments levied by the Department against the petitioner under the provisions of section 1127 of the California Unemployment Insurance Code. Written argument was filed by the petitioner and the Department.

STATEMENT OF FACTS

The petitioner is a corporation engaged in the operation of a hotel, dining room and bar in Santa Barbara, California. The assessments relate to the services of musicians who were engaged to provide music for dancing and entertainment of the patrons of the petitioner's dining room during the period from October 1, 1965 through September 30, 1968.

During the periods involved in the assessments, approximately 20 different musical groups performed services for the petitioner. The services of these groups were obtained through negotiations conducted by the president of the petitioner's corporation.

Approximately 75% of the groups were obtained through a booking agency located in Sherman Oaks, California. The agent would contact the president and request information as to the next open date.

He would advise the president as to which musical groups he had available to fulfill a contract. He would inform the president as to where a particular group was then appearing and would send him photos and publicity concerning the group which had been furnished to the agent by the leader of the group. He would recommend that the president call the location where the group was then currently appearing to obtain an opinion as to the acceptability of the group for his particular operation. On occasion the president would travel to the location in order to personally audition the group.

On other occasions the president would call the agent and request a particular group by name. If the group was not available, he would oftentimes rely upon the recommendation of the agent who was familiar with the petitioner's operations and was aware of the president's preferences as to the type of musical aggregation desired. The prime criterion was to provide danceable music to meet the varying tastes of the patrons and customers.

The agent was aware of the petitioner's budget for entertainment. If he had a group available which he rated as a "top group" he asked for the maximum price plus other fringe benefits such as rooms for the group and food and bar discounts. When the price was agreed upon, a standard form contract was executed. This contract was prescribed by the American Federation of Musicians and is commonly known as the "Form B" contract or a variation thereof. Every purchaser of music who wishes to engage the services of union musicians is required as a condition of hire to use this form contract or a variation thereof.

The contract is for the personal services of musicians and is between the purchaser of the music (called "employer") and a specified number of musicians including the leader. It specifies the location of the engagement, its duration and wage agreed upon. Paragraph 7 of the contract, Form B-2B, which was introduced into evidence, involving the services of a group known as "The Hamiltons" provides as follows:

> "The Employer shall at all times have complete supervision, direction and control over the services of musicians on this engagement and expressly reserves the right to control the manner, means and details of the performance of services by the musicians including the leader as well as the ends to be accomplished. If any musicians have not been chosen upon the signing of this contract, the leader shall, as agent for the Employer and under his instructions, hire such persons and any replacements as are required."

Under additional terms and conditions of the contract it is provided:

> "The leader shall, as agent of the Employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance. The agreement of the musicians to perform is subject to proven detention by sickness, accidents, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond their control. On behalf of the Employer the leader will distribute the amount received from the Employer to the musicians, including himself as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the Employer at or before the commencement of the employment hereunder and take and turn over to the Employer receipts therefor from each musician, including himself. The amount paid to the leader includes the cost of transportation, which will be reported by the leader to the Employer."

Space is provided on the contract for the signature of the employer, the leader of the group and for designation of the booking agent, if any. At the bottom of the contract there is a printed footnote which states:

> "This contract does not conclusively determine the person liable to report and pay employment taxes and similar employer levies under rulings of the U. S. Internal Revenue Service and of some state agencies."

Most of the groups who were engaged by the petitioner consisted of three or four musicians including the leader. Some of the groups were identified by the name of the leader, while others were identified by such names as "Playmates" and "Variety Four." The groups obtained through the booking agency in Sherman Oaks were organized combos, the leaders and individual musicians relying upon their earnings as musicians for their livelihood. They worked as much as their agent was able to provide work for them and traveled extensively to obtain such work. Normally their engagements were of four to six weeks' duration at one location and for the most part they performed in establishments similar to that operated by the petitioner.

The leader of the group selected the individual musicians and determined the wage he would pay to each of them which was not always uniform. The membership of the group was more or less permanent. The leader determined the style of music to be played and rehearsed the group. The musicians provided their own instruments and amplifying equipment. At the end of each week or other designated period, the leader was paid a lump sum by the purchaser of the music in accordance with the contract and from these proceeds he made payments to his individual musicians. The contract price was always above the minimum union scale for the locality in which they performed. The leader customarily paid for such expenses as photographs of the group and other material to publicize the group. He paid for telephone calls and other business expenses connected with the promotion of the group.

The petitioner's president testified with respect to the various groups which performed in the establishment during the assessment periods. He stated that he did not specify the kind of uniform they should wear; he did not provide them with any music or tell them the kind of music they should play; he did not fix the salary to be paid the individual musicians; he did not determine who should be hired or fired and

believed he had no authority to do so; and he relied upon the leader to handle any disciplinary problems. The individual musicians were not carried on the petitioner's payroll. He paid the designated leader the contracted lump sum weekly. He did not require rehearsals and he did not set the break periods other than to mention that the leader should gear his time so as to be able to play the one-half hour live radio show which was broadcast nightly. Whenever a new group was starting an engagement, he generally sat down with the leader to discuss the operation of the dining room and perhaps indicate what other groups had done that seemed to meet with customer satisfaction. On many occasions the president was absent from the premises for substantial periods of time.

The petitioner provided only the bandstand and a piano. In some instances particular groups did not use the piano. Although the petitioner had installed a public address system, the president indicated most of the groups preferred to use their own sound systems. The president indicated that despite his dissatisfaction with the performance of some of the groups, he believed he would be in violation of the contract if he attempted to terminate their services prior to the specific contract ending date. If customers made complaints concerning the music, and if he considered the complaints of a serious nature, he would discuss it with the leader and suggest changes. Sometimes the leader would comply and sometimes he would not.

When the petitioner ran advertisements in the local newspaper, it was primarily to promote the dining room operation of the hotel and not to advertise the group then currently appearing, although the name of the group was mentioned. Pictures of the group were shown in the lobby of the hotel and the leader or the group's name appeared on the marquee.

The aforementioned groups were engaged to perform services at the petitioner's establishment six nights per week. The petitioner also operated on Sundays and engaged the services of various groups to work as a "relief band." Some of these groups were locally established. In one instance the leader of a local group was otherwise employed full time as a college

professor. He considered himself to be a musical contractor and in addition to his Sunday night engagements for the petitioner, he also booked the group on other local engagements. This group generally consisted of three players. He considered the group to be a partnership and testified that all of the members participated equally in determining the style of music to be played and the selection of numbers. The personnel of the group varied but all shared equally in the contract price for any engagement. Because union rules required that there be a leader on every job, he was designated as leader and checks for the engagements were made out in his name. Sometimes the group was identified by his name and on other occasions they used the name "Birdmen." When the individual designated as leader was unable to play, another individual was designated as leader. When the group played at the petitioner's establishment, they performed in substantially the same manner as the groups which performed during the week.

Two other local groups were mentioned during the course of the hearing. The petitioner testified that to his knowledge one of these groups regularly played other engagements in the area.

In addition to utilizing local groups on relief nights, the petitioner also engaged the services of other groups through various booking agencies in the Los Angeles area including the agency in Sherman Oaks. Their services were obtained in substantially the same manner as the groups which performed weekly. Their contract price was negotiated with the agent and the petitioner paid the leader of the group a lump sum who in turn paid the other musicians. These groups performed services in the same manner and under the same conditions as the weekly groups except that no broadcast was required. The evidence does not disclose whether these groups also played other engagements in the area from which they traveled, but there is an inference that they did for the president testified that he was able to obtain their services on Sundays only because employment was not available for them on Sundays in the Los Angeles area.

As to the various leaders of the groups who testified in these matters, all of them indicated that they did not consider themselves as being

employees of the petitioner. In some instances they testified they considered themselves to be independent contractors. The petitioner treated all of the groups as independent contractors and made no deductions from the contract price. None of the groups involved in these assessments were organized at request of the petitioner for the purposes of providing musical services for the petitioner.

REASONS FOR DECISION

At issue in these matters is the question of whether the petitioner was the employer of the groups who provided music for dancing and for entertainment of patrons of the petitioner's dining room. The referee concluded that the petitioner did not have the right of direction and control over the various groups and that the leaders of the groups were independent contractors.

Section 601 of the California Unemployment Insurance Code provides as follows:

> "'Employment,' means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

The status of musicians under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Internal Revenue Code, has been the subject matter of considerable litigation for a number of years. The same has been true with respect to various state jurisdictions under state unemployment tax laws. The problem has not been so much the question of whether the musicians were employees, but rather the identity of the employer.

Our research has disclosed a number of federal and state court decisions which hold that the purchaser of the music is the employer of the musicians, including the leader. (General Wayne Inn v. Rothensies (1942), 47 F. Supp. 391; Dyer v. California Employment Stabilization Commission (1945), Sacramento Superior Court No. 69129; Matter of Basin Street, Inc. v. Lubin (1959), 6 N.Y. 2d 276, 160 N.E. 2d 517) There are likewise a number

of decisions which hold that the leader of the orchestra is the employer of the musicians (Williams v. United States (1942), 126 F. 2d 129; People v. Grier (1942), 53 Cal. App. 2d Supp. 841; Cutler v. United States (1960), 180 F. Supp. 360) and that his relationship to the establishments where he and his orchestra performed was that of an independent contractor. (Bartels v. Birmingham (1947), 332 U.S. 126; Mark Hopkins Inc. v. California Employment Stabilization Commission et al. (1948), 86 Cal. App. 2d 15, 193 P. 2d 792)

To a certain extent the differing results in state courts have been dictated by provisions in the various state unemployment acts setting up specific tests for determining the existence of an employer-employee relationship. (Unemployment Compensation Commission v. Mathews (1941), 56 Wyo. 479, 111 P. 2d 111; Utah Hotel Co. v. Industrial Commission (1944), 107 Utah 24, 154 P. 2d 467; Graystone Ballroom Inc. v. Baggott (1947), 319 Mich. 87, 29 N.W. 2d 256) The history of federal jurisprudence in the field of social legislation indicates a pattern of controversy over the meaning of the term "employ" and its derivatives.

With respect to the National Labor Relations Act, the United States Supreme Court said in National Labor Board Relations v. Hearst Publications (1944), 332 U.S. 111 at page 126, 88 L. Ed. 1170 at page 1182, 64 S. Ct. 851 at page 856:

> "The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.'"

This same viewpoint was later expressed by the United States Supreme Court with respect to the Social Security Act in United States v. Silk (1947), 331 U.S. 704 at page 713, 91 L. Ed. 1757 at page 1768, 67 Sup. Ct. 1463 at page 1468; and in Bartels v. Birmingham (1947), 332 U.S. 126 at page 130, 91 L. Ed. 1947 at page 1953, 67 S. Ct. 1547 at pages 1549 and 1550, 172 A. L. R. 317 at page 322. In the latter case, the court said:

> "Obviously control is characteristically associated with the employer-employee relationship but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In Silk, we pointed out that permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss from the activities were also factors that should enter into judicial determination as to the coverage of the Social Security Act. It is the total situation that controls."

Primarily upon the basis of these United States Supreme Court decisions, the Commissioner of Internal Revenue in 1947 proposed new regulations defining the employer-employee relationship for social security taxation purposes as not being restricted to the common law relation of "master and servant." (12 Fed. Reg. 7966 (1947)) This aspect of these proposed regulations aroused a storm of Congressional protest which culminated in 1948 in the passage (over a presidential veto) of what has become known as the Status Quo Resolution. (P.L. 642, 80th Congress, 2d session) It provided that the term "employee" in the social security laws should not include "any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor." (underscoring added)

Subsequent federal jurisprudence is the story of a struggle (not yet resolved) to define what Congress meant by the underscored phrase. (United States v. Webb (1970), 90 Sup. Ct. 850) Experience has demonstrated that the common law is, itself, a source of more than one set of rules for determining when an employer-employee relationship exists. Much depends upon the situation in which the problem arises.

The problems that have been and are being experienced in the interpretation of federal social legislation are interesting to us primarily because we have not experienced

them in this state since 1946. In Empire Star Mines Company, Ltd. v. California Employment Commission (1946), 28 Cal. 2d 33 at page 43, 168 P. 2d 686 at page 692, and in a number of subsequent cases, our Supreme and Appellate courts have made it clear that we are to follow a particularly defined common-law standard of status determination. For unemployment **insurance** tax purposes, the distinction between an employee and an independent contractor must be made in accordance with the standard set forth in the Restatement of the Law of Agency, section 220(2). (Tieberg v. Unemployment Insurance Appeals Board (1970), 8 Cal. 3rd ____, 471 P. 2d 975)

In Tieberg v. Unemployment Insurance Appeals Board, supra, involving the status of individuals who were employed to write television stories and plays, the California Supreme Court stated:

> "We first examine the trial court's conclusion that the sole factor relevant to a determination of the writers' status was whether Lassie had the right to control the details of their work under the agreements and whether this right was exercised. In Empire Star Mines this court, holding that a mining company was not an employer within the meaning of the Unemployment Insurance Act, said, 'In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. (Citations.) Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without

supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (Rest., Agency, § 220; Cal. Ann., § 220.)'

"A number of cases subsequent to Empire Star Mines also applied the multifactor test adopted therein. (See, e.g., Isenberg v. California Emp. Stab. Com., supra, 30 Cal. 2d 34, 38-41; Tomlin v. California Emp. Com. (1947) 30 Cal. 2d 118, 122-123; Twentieth etc. Lites v. Cal. Dept. Emp. (1946) 28 Cal. 2d 56, 60-61; California Emp. Stab. Com. v. Morris (1946) 28 Cal. 2d 812, 819-820.) These factors are set forth in the Restatement of Agency, section 220, which has been revised since the above decisions to include two additional elements, i.e., the extent of control, and whether the principal is or is not in business.

"The right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship and the other matters enumerated constitute merely 'secondary elements.' (See Isenberg v. California Emp. Stab. Com., supra, 30 Cal. 2d 34, 39.). These cases are in accord with federal decisions which, for the purpose of determining liability for federal unemployment insurance taxes, hold that the right to control and direct the individual who performs services as to the details and means by which the result is accomplished is the most important consideration but not the only element in determining whether an employment relationship has been created."

We turn now to some of the court decisions relating directly to the status of musicians.

In Bartels v. Birmingham (1947), 332 U.S. 126, the United States Supreme Court considered the status of dance bands hired by the petitioners (operators of public dance halls) to play for limited engagements at their establishments. The collective bargaining agreements recited that the ballroom operators were the employers of musicians in a band and that the "employer shall at all times have complete control of the services which the employee will render." The evidence showed however that the bandleader exercised complete control over the musicians. The court held the fact that the contract gave the operators the right to control the musicians was not conclusive, and that the bandleaders, rather than the ballroom operators, were in fact the employers of the musicians.

This holding was followed in Mark Hopkins Inc. v. California Employment Stabilization Commission et al. (1948), 86 Cal. App. 2d 15.

In Tieberg v. Unemployment Insurance Appeals Board, supra, the California Supreme Court stated, "We recognize that the terminology used in an agreement is not conclusive, however, even in the absence of fraud or mistake." In a footnote following mention of the Mark Hopkins case, the court stated:

> "Amicus Curiae who have filed a brief on behalf of the director attempt to distinguish the Mark Hopkins case upon the ground that the case did not turn upon whether the musicians were employees or not but upon who was liable for the taxes 'the true employer.' While this may be true, that decision, as well as Bartels, nevertheless stands for the proposition that the mere recitation in a collective bargaining agreement that a person has the right to control the services rendered by another is not conclusive."

It is reasonable to conclude from the foregoing that where there is an agreement between the purported employer and employee setting forth the details of their relationship, such agreement is a significant factor, but not conclusive, in determining status for unemployment tax

purposes. If the actual working conditions do not support the contractual expressions in regard to the relationship, we are permitted to make findings contrary to those expressed in the contract. The weight to be given such contractual expressions is considerably lessened where, as here, the form union contract must be signed if the services are to be rendered at all.

In Bartels v. Birmingham, supra, the United States Supreme Court referred to the musical groups involved as "name bands." During the 1930's and early 1940's certain dance bands or orchestras achieved great popularity with the youth of that day. Such names as Guy Lombardo, Tommy and Jimmy Dorsey, Benny Goodman, Duke Ellington, Count Basie and Glenn Miller became practically household words. These bands generally consisted of from 12 to 16 sidemen and were headed by a leader who had achieved a certain amount of fame, either as an instrumentalist or vocalist. Because of his own unique style of playing or singing, he developed, through musical arrangements, a distinctive band style which was easily recognizable by the listening public. Radio and recordings were the mediums which gave impetus to this particular phenomenon. Gradually, featured sidemen became as well known as the leaders and were considered an integral part of the band, helping to create and sustain the style by which the band was identified. These sidemen frequently left the band of which they were members to organize their own bands and become "name bands." An outstanding example of this situation would be the Benny Goodman orchestra which featured such sidemen as Harry James, Ziggy Elman, Gene Krupa, Teddie Wilson and Lionel Hampton, all of whom later established bands of their own. (The Great Bands by John S. Wilson record reviewer for the New York Times and High Fidelity Magazine - published by Reader's Digest Association, Inc.; Great Dance Bands by Leo Walker (1964), published by Howell-North Books, Berkeley, California)

These so-called "name bands" generally obtained their engagements through a booking agency. The contract for engagements was for a fixed fee although it was not unusual for such contracts to include a percentage of the gross receipts to the leader above a certain figure. The leader hired and fired the sidemen and contracted with them individually as to salary they would be paid. The leader exercised control over the details of the operation of the band. (Nebraska Nat. Hotel Co. v. O'Malley (1945) 63 F. Supp. 26) He was truly the

employer of the members of his band for federal employment tax purposes and most state courts so held prior to and subsequent to the Bartels decision. However as to bands with local rather than national reputation, the courts were more inclined to find that the purchaser of the music was the employer of the leader and the sidemen, especially where the personnel of the band tended to vary from engagement to engagement.

There also developed a line of court and administrative decisions in which the band or orchestra was designated as a "house band." In this type of situation the band was engaged by the purchaser of the music on a more or less regular basis. The duration of such engagements was often for extended periods and apparently the courts were influenced somewhat by that fact in concluding that the purchaser of the music was the employer. In some instances the band was an organized group headed by a leader who regularly contracted for the services of his group. In other instances the purchaser of the music would hire an individual musician and instruct him to obtain a specified number of musicians and specific instrumentation. The purchaser determined the amount he would pay to each musician and designated the leader. He also reserved the right to change personnel and instrumentation. The courts usually concluded that under these facts the purchaser of the music was the employer. (Federal Internal Revenue Ruling 68-107, I.R. Bulletin 1968 - 9, 18, 2/26/68)

We are not impressed with the approach taken in some of these court decisions which seem to resolve the issue on the basis of labels such as "name band" and "house band." This approach accords greater weight to form rather than substance. (Powell, et al. v. California Department of Employment (1965), 63 Cal. 2d 103, 45 Cal. Reptr. 136, 403 P. 2d 392) As previously stated, we are obligated to follow a particularly defined common-law standard of status determination. For unemployment insurance tax purposes the distinction between an employee and an independent contractor must be made in accordance with the standards set forth in the Restatement of the Law of Agency, section 220(2). The right to control the means by which the work is accomplished is clearly the most significant test of the employment relationship and the other matters enumerated constitute merely "secondary elements." (Tieberg v. Unemployment Insurance Appeals Board)

While there are today but a few surviving "name bands" of the 30's and 40's, the factors which caused the courts to conclude that the leader of these bands was the employer of the sidemen are of significance today because we still have musical groups organized on somewhat the same basis.

The musical groups of today are much smaller in size, but through the mediums of television and recordings they have achieved national and international reputations. The recently disbanded "Beatles," "Dave Clark Five" and the "Rolling Stones" are examples of groups who have achieved such reputations. (Rock From the Beginning by Nik Cohn, 1969, Stein and Day, Publishers, New York; The Story of Rock by Carl Belz, 1969, Oxford University Press, New York) While these groups have fewer personnel, they have substantial investments in electronic equipment which produces sound equal to or exceeding in volume the earlier larger bands. In some instances, today's groups operate on a "cooperative basis" and file returns as a "partnership" within the meaning of section 7701(a)(2) of the Internal Revenue Code. (Federal Internal Revenue Ruling 68-107, I.R. Bulletin 1968-9, 18, 2/26/68) All individuals have a voice in the membership thereof, the engagements to be accepted, and all matters pertaining to the operation of the group. The profits and losses, if any, are shared equally. In other instances there is a leader who is instrumental in organizing the group, selecting the musicians and determining their salaries, negotiating engagements, and who determines the style of music and the selections to be played.

We now turn our attention to the matters before us on appeal. We first consider the groups obtained through the booking agency in Sherman Oaks and who performed services for the petitioner six nights per week.

The evidence discloses that these groups were permanent organizations regularly engaged in providing music for dancing and entertainment in establishments throughout the country similar to that of the petitioner. The booking agency had contracted with the leaders of the groups to obtain work for them for

a percentage of the contract price. The booking agency negotiated the contracts with the petitioner on behalf of the leaders. The leaders had organized the groups initially and hired musicians whose particular skills they believed to be best fitted for the style of music they desired to present. They contracted individually with the musicians as to the salary they would receive and paid the musicians individually from the lump sum contract price received from the petitioner.

The leaders provided such musical arrangements as were required and determined the style of music to be played. They supervised the deportment of the musicians and determined the kind of uniform to be worn. They had sole authority to discharge. They bore the burden of expenses incurred in publicizing the groups and bore the risks and opportunities of profit or loss depending upon the negotiated contract price for the engagement. The groups provided their own equipment which could represent a substantial investment considering the customary use of highly sophisticated amplifying systems.

The petitioner provided only a piano which was not always used and the place to play. The petitioner did not in any way attempt to interfere in the performance of the groups and only made suggestions for change when he considered customer complaints to be of a substantial nature. The leaders did not always comply with these suggestions. In this regard there are, of course, situations in which a purchaser of music may more actively participate in the conduct of the musicians. For example, in People v. Grier ((1942), 53 A.C.A. 1051, 128 Pac. 2d 207), the court stated:

> "The 'things done' by the establishments, as set forth in the stipulation, were those which appear reasonable from the nature of their business, and were directed toward the 'results' to be accomplished rather than the 'means' used therefor. (Western Indemnity Co. v. Pillsbury, supra.) The 'results' for the most part were the entertainment and satisfaction of the public, the orchestra being one of the attractions. For this purpose the establishments designated the

place of performance, gave directions covering what they expected, prescribed the route to be followed in going to and from the orchestra stand, gave orders re the conduct of members during rest period, required the orchestra to coordinate and conform to the convenience of the rest of the activities carried on by the establishments, required home town music to be played and at certain tempo, and required the wearing of particular uniforms. Such 'rights' did not in themselves create the relationship of master and servant. (See cases cited below.)

"On the other hand the employment contract was for a fixed term with no right of discharge of either the appellant or the members of his orchestra. (Winther v. Industrial Accident Comm., supra; In re Earle, May, 1941) 27 N.Y.S. (2) 310.) The compensation to appellant was a fixed sum for the engagement with no attempt to interfere with appellant's right to hire and discharge his orchestra's members and to pay them such wages and at such times as he desired. Also the manner in which the musical selections were to be arranged and presented was entirely under appellant's control. It thus appears that while the establishments exercised a certain measure of control for a definite purpose, they did not have 'authoritative' or 'complete control.' (Western Indemnity Co. v. Pillsbury, supra; Bohanon, as Admx. v. McClatchy Co., supra.) The reservation of powers was necessary to enable the establishments 'to coordinate the entire performance' and 'the requirement to abide by reasonable rules and regulations,' in view of their business, would naturally be imposed upon independent contractor and employees alike. (Brosius v. Orpheum Theater Co., Ltd., supra.) See also In re Radio City Corp. (Nov., 1941) 31 N.Y.S. (2) 284."

We are impressed by the court's assessment of the weight to be given to the various factors involved. The court conceded the establishments exercised a certain measure of control but recognized that these were controls which would naturally be imposed upon independent contractors and employees alike. Similarly, in the instant cases, any reservation of powers by the petitioner was to enable petitioner to coordinate the entire performance. The contracts between the parties, which purport to give the petitioner complete control over the services of the musicians, are not conclusive and are entitled to but little weight where, as here, the actual working conditions do not support the contractual expressions. We conclude that the petitioner was not the employer of the groups or leaders of the groups whose services were obtained through the booking agency in Sherman Oaks and who performed for the petitioner on a six nights per week basis.

Next we consider the status of the out of town groups who were engaged solely for Sunday night relief work. For the most part the services of these groups were obtained through agents. Except for the radio broadcasts, they performed their services in essentially the same manner and under the same conditions as the weekly groups. We have inferred that these groups played engagements elsewhere for the petitioner was able to obtain their services only because Sunday employment was not available for them in the Los Angeles area. It is clear that none of these groups was organized at the request of the petitioner. We can find no reasonable ground for distinction between these groups and the groups which performed during the week. The petitioner did not have a right of control over the leaders or musicians.

Finally, we consider the status of the local groups who played only the Sunday night relief jobs. What little evidence there is in the record shows that these groups were organized groups who regularly played casual engagements for others in the area before, during and after the assessment periods. They performed services for the petitioner in substantially the same manner and under the same conditions as the out of town relief bands and the groups which performed during the week.

We can find no reasonable grounds for distinction between these groups and the other relief groups which performed on Sundays. The petitioner did not have the right of control over the leaders or the musicians.

DECISION

The decision of the referee is affirmed. The petitions for reassessment are granted.

Sacramento, California, February 10, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

LOWELL NELSON

CLAUDE MINARD

JOHN B. WEISS

DON BLEWETT